**J RASVINDAR SINGH JAGGIR SINGH** A

**v.**

**PP**

COURT OF APPEAL, PUTRAJAYA B
AHMAD MAAROP JCA
CLEMENT SKINNER JCA
MOHAMED APANDI ALI JCA
[CRIMINAL APPEAL NO: K-05-04-2008]
26 JANUARY 2012 C

***CRIMINAL PROCEDURE:*** *Prosecution - Prima facie case - Maximum evaluation of evidence as mandated under s. 180 Criminal Procedure Code - Whether properly exercised by trial judge - Whether there was misdirection - Whether prosecution failed to establish prima facie case - Whether conviction of appellant safe* D

***EVIDENCE:*** *Information leading to fact discovered - Admissibility of - Evidence Act 1950, s. 27 - Oral evidence - Words testified not similar as purported information in police report - Whether qualified to be admitted - Whether evidence highly prejudicial to appellant* E

***EVIDENCE:*** *Witnesses - Interested witnesses - Credibility of - Whether witnesses were accomplices - Failure to consider witnesses were interested witnesses who did not give consistent narratives of events*

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The appellant was found guilty and convicted for an offence under s. 302 of the Penal Code. At the commencement of the trial, the appellant had been charged with another co-accused, one Kartik Thavasi Kanoo ('Kartik'). However, at the end of the prosecution's case, the trial court acquitted and discharged Kartik G and made a finding that a *prima facie* case had been proved against the appellant alone. The findings of the trial judge as to the appellant's act that constituted the commission of the alleged offences were based on (i) the acceptance of the evidence of SP6, SP8 and SP9 that the appellant and Kartik had assaulted the H deceased who was lying on the ground after he had fallen off a motorcycle; (ii) the evidence of information leading to discovery of a piece of wood given by the appellant after his arrest by the police and (iii) the evidence of SP9, which exculpated the co-accused, Kartik, of the offence. The appellant contended that (i) I there was no maximum evaluation of the prosecution evidence as

A mandated under s. 180 of the Criminal Procedure Code *(Magendran Mohan v. PP)*; (ii) there was a failure to consider that the witnesses, SP6 and SP8 as accomplices, in the circumstances, were not credible or reliable; (iii) the information leading to discovery given by the appellant was wrongly admitted; and (iv) B the defence story had not been properly evaluated.

**Held (unanimously allowing the appeal; setting aside conviction and sentence; acquitting and discharging the accused)**

C **Per Mohamed Apandi Ali JCA:**

**(1)** SP6 and SP8 were originally jointly charged with the appellant for the alleged offence. However, when the trial commenced, both SP6 and SP8 became prosecution witnesses. From the events prior to and leading to the alleged assault on the D deceased, it was also undisputed that both SP6 and SP8 were accomplices. From such circumstances, it could reasonably be inferred that SP6 and SP8 were interested witnesses. The failure to consider that SP6 and SP8 were interested witnesses and who did not give consistent narratives of the events and E the failure to properly evaluate the probative value of SP9's evidence, did not indicate that a maximum evaluation of the evidence had been exercised by the trial judge. (paras 13 & 17)

F **(2)** The trial judge did not consider the fact that SP9 gave false information to the doctor on duty at Sungai Petani Hospital to the effect that the deceased was injured in a traffic accident. This evidence, given by a prosecution witness, ought to be viewed critically as such evidence would greatly affect G the credibility of the witness. Any failure to do so is an indication of non-direction on the maximum evaluation exercise of prosecution evidence. Such non-direction was a misdirection by the trial judge. (paras 19 & 21)

H **(3)** The oral evidence of SP10 gave the information ... "kayu itu digunakan untuk memukul simati". Such information does not lead to discovery and does not qualify to be admitted as evidence under the provision of s. 27 of the Evidence Act 1950. Furthermore, the said words as testified by SP10 was

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not the same as the purported information stated in the police report. Such evidence was highly prejudicial to the appellant and such prejudicial evidence ought not to be relied upon by the trial judge. (paras 23 & 24)

**(4)** The prosecution had failed to establish a *prima facie* case. The evidence of the participation of Kartik in the assault on the deceased would undoubtedly create doubts in the prosecution's case. Based on the number of flaws in the evaluation of the evidence, this was a fit and proper case for this court to interfere with the findings and conclusion of the trial judge. The conviction of the appellant was not safe. The evidence did not irresistibly point to the guilt of the appellant. (para 29)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu didapati bersalah dan disabitkan dengan kesalahan di bawah s. 302 Kanun Keseksaan. Pada permulaan perbicaraan, perayu telah dituduh dengan seorang tertuduh lagi, Kartik Thavasi Kanoo ('Kartik'). Walau bagaimanapun, pada akhir kes pendakwaan, mahkamah bicara melepaskan dan membebaskan Kartik dan membuat dapatan bahawa satu kes *prima facie* telah dibuktikan terhadap perayu seorang. Dapatan-dapatan hakim bicara mengenai tindakan perayu yang telah menentukan perbuatan kesalahan-kesalahan yang didakwa adalah berdasarkan (i) penerimaan keterangan SP6, SP8 dan SP9 bahawa perayu dan Kartik telah menyerang simati yang terbaring di atas tanah selepas terjatuh dari motorsikal; (ii) keterangan menerima masuk maklumat yang membawa kepada penemuan sekeping kayu yang diberi oleh perayu selepas penangkapannya oleh pihak polis dan; (iii) keterangan SP9, yang telah melepaskan Kartik dari kesalahan itu. Perayu berhujah bahawa (i) tiada penilaian maksima keterangan pendakwaan sebagaimana dimandatkan di bawah s. 180 Kanun Tatacara Jenayah *(Magendran Mohan v. PP)*; (ii) terdapat kegagalan untuk mempertimbangkan bahawa saksi-saksi, SP6 dan SP8 sebagai rakan sejenayah, dalam keadaan yang wujud tidak boleh dipercayai; (iii) maklumat yang membawa kepada penemuan yang diberi oleh perayu salah diterimamasuk; dan (iv) pembelaan yang diberi tidak dinilai dengan betul.

A **Diputuskan (sebulat suara membenarkan rayuan; mengenepikan sabitan dan hukuman; melepaskan dan membebaskan tertuduh)**
**Oleh Mohamed Apandi Ali HMR:**

B **(1)** SP6 dan SP8 pada asalnya dituduh bersama-sama dengan perayu untuk kesalahan yang didakwa. Walaubagaimanapun, apabila perbicaraan bermula, kedua-dua SP6 dan SP8 menjadi saksi-saksi pihak pendakwaan. Daripada peristiwa-peristiwa yang berlaku sebelum dan yang membawa kepada serangan ke
C atas simati yang didakwa, tidak dipertikaikan bahawa kedua-dua SP6 dan SP8 adalah rakan-rakan sejenayah. Daripada keadaan-keadaan sebegitu, ia adalah munasabah untuk menyimpulkan bahawa SP6 dan SP8 adalah saksi-saksi berkepentingan. Kegagalan untuk mempertimbangkan bahawa
D SP6 dan SP8 adalah saksi-saksi berkepentingan yang tidak memberi naratif yang konsisten mengenai peristiwa-peristiwa yang berlaku dan kegagalan untuk menilai dengan betul nilai probatif keterangan SP9, tidak menunjukkan bahawa satu penilaian maksima keterangan telah dilaksanakan oleh hakim
E bicara.

**(2)** Hakim bicara tidak mempertimbangkan fakta bahawa SP9 telah memberi maklumat palsu kepada doktor yang bertugas di Hospital Sungai Petani iaitu bahawa simati cedera akibat
F kemalangan jalanraya. Keterangan ini, yang diberi oleh saksi pihak pendakwaan, patut dilihat secara kritikal kerana keterangan sebegitu akan menjejaskan kredibiliti saksi-saksi. Kegagalan berbuat demikian adalah tanda ketiadaan arahan untuk menilai dengan maksima keterangan pihak pendakwaan.
G Ketiadaan arahan seperti itu adalah satu salah arahan oleh hakim bicara.

**(3)** Keterangan lisan SP10 memberi maklumat ... "kayu itu digunakan untuk memukul simati." Maklumat seperti itu tidak membawa kepada penemuan dan tidak layak untuk diterima
H masuk sebagai keterangan di bawah peruntukan s. 27 Akta Keterangan 1950. Tambahan pula, perkataan-perkataan tersebut yang diberi keterangan oleh SP10 bukan sama dengan maklumat dimaksudkan yang dinyatakan di dalam laporan polis.
I Keterangan sebegitu adalah sangat memprejudiskan kepada perayu dan hakim bicara tidak patut bergantung kepada keterangan memprejudiskan sebegitu.

**(4)** Pihak pendakwaan gagal membuktikan kes *prima facie*. Keterangan penglibatan Kartik di dalam serangan ke atas simati mewujudkan keraguan di dalam kes pendakwaan. Berdasarkan bilangan kecacatan di dalam penilaian keterangan, ini adalah kes yang tepat dan sesuai untuk mahkamah campurtangan dengan dapatan-dapatan dan kesimpulan hakim bicara. Sabitan perayu adalah tidak selamat. Keterangan tidak menunjukkan yang perayu bersalah.

**Case(s) referred to:**
*Amathevelli v. PP [2009] 3 CLJ 109 FC* ***(refd)***
*Liow Siow Long v. PP [1969] 1 LNS 98 HC* ***(refd)***
*Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(refd)***
*Magendran Mohan v. PP [2011] 1 CLJ 805 FC* ***(refd)***
*TN Nathan v. PP [1977] 1 LNS 127 HC* ***(refd)***

**Legislation referred to:**
Child Act 2001, s. 97(2)
Criminal Procedure Code, s. 180
Evidence Act 1950, s. 27
Penal Code, s. 302

*For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co*
*For the respondent - Awang Armadajaya DPP*

*[Appeal from High Court, Alor Star; Criminal Trial No: 45-24-2002]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Mohamed Apandi Ali JCA:**

### Introduction

**[1]** The appellant was found guilty and convicted for an offence under s. 302 of the Penal Code. Due to the appellant's young age, the appellant was sentenced to be detained in prison at the pleasure of the Ruler, under s. 97(2) of the Child Act 2001.

**[2]** At the commencement of the trial, the appellant was charged with another co-accused, Kartik a/l Thavasi Kanoo and the charge reads as follows:

A Bahawa kamu bersama-sama pada 3.3.2002 jam lebih kurang 11.00 malam, di tepi jalan, berdekatan bengkel JKR, Jalan Lencongan Timur Aman Jaya di Daerah Kuala Muda, di dalam Negeri Kedah, telah dengan sengaja mendatangkan kematian kepada Saravanan a/l Jay Remey KP. 830509-02-5933. Oleh yang demikian telah melakukan kesalahan yang boleh dihukum di bawah B seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun Keseksaan.

**[3]** At the end of the case for the prosecution, the trial court acquitted and discharged the co-accused and the appellant's C defence was called on an amended charge, which reads as follows:

Bahawa kamu pada 3.3.2002 jam lebih kurang 11.00 malam, di tepi jalan berdekatan bengkel JKR, Jalan Lencongan Timur Aman Jaya, dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman telah melakukan kesalahan membunuh ke atas Saravanan D a/l Jay Remey (KP. 830509-02-5933) dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan.

## Factual Matrix Of The Case

E **[4]** The facts of the case are well set out in the judgment of the learned trial judge. Thus in this judgment, we need not repeat the facts, but shall only refer to the basic relevant facts and events as found by the learned trial judge.

F **[5]** According to the pathologist, SP7, the cause of death was due to "head injury due to blunt trauma". This fact was undisputed.

**[6]** On the night of the incident, the deceased, Saravanan was a rider of a motorcycle with SP9, Kasavan as his pillion rider. The G appellant was the pillion rider of a motorcycle ridden by SP8, Ganesan. The co-accused, Kartik was the pillion rider of another motorcycle ridden by SP6, Sugumar.

**[7]** According to SP6, Sugumar, he and SP8, Ganesan, with their respective pillion riders chased after the motorcycle ridden by H the deceased. SP6 also gave evidence that both the appellant and the co-accused, Kartik as pillion riders had a long stick each. On the instructions of Kartik, the deceased motorcycle was blocked by the motorcycle ridden by SP6. SP6 further narrated that, I Kartik jumped from the motorcycle and assaulted the pillion rider (SP9) and at that time the deceased fell from his motorcycle. Both, Kartik and the appellant then assaulted the deceased who

was lying on the ground. According to SP9, Kasavan, the assault incident took place within a short span of time of between 3 to 4 minutes only and there were six persons at the material time.

**[8]** Those are the relevant facts but nevertheless disputed.

## Findings By The High Court

**[9]** The learned trial judge, at the end of the prosecution's case made a finding that a *prima facie* case has been proved against the appellant alone. The findings by the learned trial judge as to the act of the appellant that constituted the commission of the alleged offence were based on:

(i) the acceptance of the evidence of SP6, Sugumar; SP8, Ganesan and SP9, Kasavan;

(ii) the evidence of information leading to discovery of a piece of wood given by the appellant after his arrest by the police; and

(iii) the evidence of SP9, Kasavan, which exculpated the co-accused, Kartik of the offence.

## The Appellant's Contentions

**[10]** The appellant's counsel put forward three basic contentions:

(i) that there was no maximum evaluation of the prosecution evidence as mandated under s. 180 of the Criminal Procedure Code and as reaffirmed by the case law of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and as approved by the Federal Court in *Magendran Mohan v. PP* [2011] 1 CLJ 805;

(ii) that there was a failure to consider that the witnesses, SP6 and SP8 as accomplices, are in the circumstances, not credible or reliable;

(iii) that the information leading to discovery given by the appellant was wrongly admitted; and

(iv) that the defence story has not been properly evaluated, namely not tested with the cautioned statement of SP6, Sugumar, which was tendered by the defence as exh. D28.

A **Our Analysis And Findings**

**[11]** As the contentions by the appellant in (i) and (ii) above are inter-related, we shall deal with them together.

B **[12]** It is not in dispute that SP6 and SP8 were originally jointly charged with the appellant for the alleged offence. This can be seen at the initial charging at the Magistrate's Court at Sungai Petani. This was on 18 March 2002. When the trial commenced on 2 September 2002, both SP6 and SP8 became prosecution witnesses.

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**[13]** From the events prior to and leading to the alleged assault on the deceased, it was also undisputed that both SP6 and SP8 were accomplices. In fact the learned trial judge did indicate that he accepted the defence submission that SP6 and SP8 were D accomplices. It is our judgment that having accepted that fact, the trial judge ought to have taken the next step of considering whether the witnesses are reliable or otherwise. Having been satisfied as to the issue of reliability then only the subsequent step of evaluating whether there is a need of corroborative evidence E can be taken. The law on this has been succinctly put by Gunn Chit Tuan J in *T.N. Nathan v. PP* [1977] 1 LNS 127; [1978] 1 MLJ 134, p. 137, which reads:

> It was common ground that he was an accomplice and that there F was no corroboration of his testimony. Even if there was corroboration, the evidence of the accomplice in this case could not be corroborated because he was not a credible or reliable witness. Thus it was held by the Supreme Court of India in the case of *Sarwan Singh v. State of Punjab* AIR 1957 SC 637, 641 that:
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> G
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> > … before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then H there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.
> >
> > In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that I he is a reliable witness and that is a test which is common

> to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver.

Lord Hailsham has expresses a similar opinion in the English House of Lord's case of *Director of Public Prosecutions v. Kilbourne* [1973] 1 All ER 440, 452 when he said as follows:

> Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise.

In our case, as the accomplice could not be considered a reliable or credible witness, the question of corroboration therefore did not arise.

**[14]** The learned trial judge held that he accepted SP6 and SP8 evidence, despite them being accomplices, because he found that their evidence did not contradict each other and that it was corroborated by the evidence of SP9 and the evidence of the discovery of the weapon, exh. P23B. This is illustrated in his grounds, when he wrote:

> Saya sedar dan menerima hujah pembelaan bahawa SP6 dan SP8 adalah rakan sejenayah kerana terlibat dalam kes tersebut tetapi saya mendapati keterangan mereka tidak bercanggah di antara satu sama lain dan yang lebih penting lagi ialah keterangan-keterangan mereka disokong oleh keterangan SP9 dan juga penemuan senjata yang digunakan iaitu ekshibit P23B.

**[15]** There was no discussion as to why SP6 and SP8 were accepted as reliable witnesses. A *fortiori*, there was no mention of the fact that both SP6 and SP8 were detained for a few months before the charges were withdrawn against them. From such circumstances, it can be reasonably inferred that SP6 and SP8 are interested witnesses. On the finding that there was no

A contradictions between the evidence of SP6 and SP8, upon a closer scrutiny of their evidence, we find otherwise. At p. 22 of the appeal records, SP6 said: "Semasa saya melihat Kartik dan Rasvindar memukul mangsa, saya berada di atas motosikal …". Whereas, SP8, at p. 43 said: "Rasvindar memukul mangsa iaitu B yang menunggang motosikal itu. Dia bukan mangsa yang Kartik pukul itu."

**[16]** As to the corroboration by SP9, we find that SP9's evidence is neutral in nature. This can be seen in his evidence at C pp. 50-52 of the appeal records, where SP9 said: "Saya tidak tahu siapa yang memukul saya …". "Saya tidak tahu siapa yang memukul Saravanam. Saya nampak Saravanam dipukul …". "… pada mulanya Saravanam yang dipukul dan selepas itu mereka memukul saya."

D **[17]** The failure to consider that SP6 and SP8 were interested witnesses and who did not give consistent narratives of the events and the failure to properly evaluate the probative value of SP9's evidence, does not indicate that a maximum evaluation of the evidence has been exercised by the learned trial judge.

E **[18]** On interested witnesses, we are mindful of what Raja Azlan Shah J (as HRH then was) said in *Liow Siow Long v. PP* [1969] 1 LNS 98; [1969] 1 MLJ 40, at p. 41, which reads as follows:

> F Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses and competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg, they are either partisans of the complainant or are in any way inimical to the accused, then their G testimony is tainted and requires corroboration if to be acted upon.

**[19]** On the issue of credibility, we also noted that the learned trial judge did not consider the fact that SP9 gave false information H to the doctor on duty at Sungai Petani Hospital to the effect that the deceased was injured in a traffic accident. It was also in evidence that SP9 also told the police at the hospital that the deceased was knocked by a car. This piece of evidence, which was adduced during cross-examination, can be seen at p. 54 of I the appeal records, which reads:

S: Selain daripada beritahu doktor ada awak beritahu Polis bernama Zainal Abidin yang Saravanan dilanggar kereta? A

J: Ya.

**[20]** On re-examination, SP9 (at p. 55 of the appeal records) said: B

Saya beri maklumat palsu kepada Polis di Pondok Polis Hospital kerana saya takut kerana Saravanan telah meninggal dunia.

**[21]** This evidence, given by a prosecution witness, ought to be viewed critically as such evidence will greatly affect the credibility of the witness. Any failure to do so is an indication of non-direction on the maximum evaluation exercise of prosecution evidence. Such non-direction is a misdirection by the learned trial judge. C D

**[22]** On the information leading to discovery. The governing provision is s. 27 of the Evidence Act 1950. In this case, such evidence was adduced through the I.O, ASP Lim Soh Aik, SP10. The relevant portion of the evidence, can be seen at pp. 57-58 of the appeal records, which reads as follows: E

Kita ada tahan Kartik dan Ganesan a/l Narayanan. Saya ada buat soalsiasat ke atas Rasvindar pada 11.3.2002 bersama Kpl. Mogan dan Amaresan di Pejabat Mata-mata Gelap IPD Kuala Muda. Rasvindar ada beri maklumat. Selepas itu saya bersama Kpl. Mogan, L/Kpl. Amaresan, Lim, Ang dan Jasvinder Singh telah pergi ke rumah kedai di Taman Songket. Di situ Rasvindar Singh telah tunjuk sebatang kayu di longkang depan kedai No. 1, Lorong Songket. Di situ Rasvindar Singh telah tunjuk sebatang kayu di longkang depan kedai No. 1, Lorong Songket 1. Saya arahkan L/Kpl. Roslan ambil gambar tempat kayu itu ditemui dan saya rampas kayu itu. Saya tanda kayu itu "C2". F G

Maklumat yang diberi oleh Rasvindar Singh ialah kayu itu digunakan untuk memukul simati.

**[23]** From the reading of the oral evidence of SP10, the information said to be given is: "... kayu itu digunakan untuk memukul simati." On the face of it, such information does not lead to any discovery. On that score alone that information does not qualify to be admitted as evidence under the provisions of s. 27 of the Evidence Act 1950. H I

**[24]** Even if the so-called information was as alleged to have been taken down in writing in the form of the police report, exh. P26, it is our judgment that such information is not a piece of evidence admissible under s. 27. It has been held by the Federal Court in *Amathevelli v. PP* [2009] 3 CLJ 109 that evidence of information leading to discovery must be oral evidence. The actual words used by the giver of the information must be stated orally. This is not the position in the case in hand. Furthermore the words "kayu itu digunakan untuk memukul simati" as testified by SP10 are not the same as the purported information stated in the police report. Such evidence is highly prejudicial to the appellant. It is our judgment that the admission of such prejudicial evidence was wrongly admitted and ought not to be relied upon by the learned trial judge.

**[25]** For the reasons stated above, it is our finding that the prosecution has failed to establish a *prima facie* case and as such defence should not have been called.

**[26]** However, if for a moment, our finding above is wrong, we shall consider and evaluate the appellant's defence.

**[27]** In his defence the appellant tendered the cautioned statement of Sugumar, SP6 and it was marked as exh. D28. D28 can be seen at pp. 223-226 and the relevant portion to be evaluated is at p. 225, which, *inter alia*, reads:

> Kartik juga memukul Saravanan dan kawan Saravanan dengan kayu.

**[28]** In view of such evidence, it is incumbent upon the trial judge to re-evaluate SP6's evidence. SP6's evidence has to be tested with the admissible evidence found in exh. D28. Had such exercise been done, it is our judgment that the trial judge would have concluded that a reasonable doubt had been raised by the appellant.

**[29]** Bearing in mind that the appellant's defence was called on an amended charge (which excluded the common intention element), the evidence of the participation of Kartik in the assault on Saravanan, will undoubtedly create doubts in the prosecution's case.

## Conclusion

**[30]** We are aware that where a life has been lost, justice must be done to the deceased. But on the other hand an accused person, who is presumed innocent until proven guilty, is entitled to be tried and so proven in accordance with and in the manner required by law.

**[31]** Based on the number of flaws in the evaluation of the evidence, it is our judgment that this is a fit and proper case for us to interfere with the findings and conclusion of the learned trial judge. For the reasons as explained above, we are convinced that the conviction of the appellant is not safe. The evidence does not irresistibly point to the guilt of the appellant. We therefore, unanimously allowed the appeal. The conviction and sentence of the appellant is set aside. The appellant is hereby acquitted and discharged.